

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Indiana Supreme Court is in the Record, on pages 388 to 393. It has not as yet been officially reported, but is unofficially reported in 48 N. E. (2nd) 808.

II.

1. The date of the judgment and opinion of the Supreme Court of Indiana, sought to be reviewed is May 20, 1943 (369). A petition for a rehearing was duly filed by petitioners on June 8, 1943 (375). The Supreme Court of Indiana modified its opinion and denied the petition for rehearing on June 16, 1943 (388).

2. The statutory provision which is believed to sustain the jurisdiction of this court to grant the Writ of Certiorari is U. S. C. A., Title 28, Sec. 344 (b).

III.

Statement of the Case.

The case has been heretofore stated in the petition on pages 4 to 6 which statement is hereby adopted.

The cases believed to sustain the jurisdiction are as follows:

Rector v. City Deposit Bank Co., 200 U. S. 405.

Eau Claire National Bank v. Jackman, 204 U. S. 522.

Lesser v. Grey, 236 U. S. 70.

IV.

Specifications of Error.

1. The Supreme Court of Indiana erred in its opinion in holding that the Porter Circuit Court of Indiana had jurisdiction over the person of Bartol Sikich, and over the bankrupt's estate.

2. The Supreme Court of Indiana erred in its opinion and judgment herein in holding that the respondent as trustee in bankruptcy could recover, as assets of the bankrupt, property conveyed by the bankrupt to the petitioner, Transfer Realty Company, Inc. more than three years before the bankruptcy; said property having been so conveyed without fraud or intent to defraud.

3. The Supreme Court of Indiana erred in its opinion and judgment herein in holding that petitioners Bartol Sikich and Emma Sikich are each personally liable to the respondent for the earnings of the real estate conveyed without fraud by the bankrupt to the Transfer Realty Company, Inc., more than three years prior to the voluntary adjudication in bankruptcy of petitioner, Bartol Sikich.

V.

Summary of Argument.

POINT A.

The Porter Circuit Court did not have jurisdiction of an action by a trustee in bankruptcy to recover as assets of the bankrupt, properties conveyed by the bankrupt to a corporation which was the *alter ego* of the bankrupt, and which the complaint alleged, always remained in the possession and control of the bankrupt.

POINT B.

If the bankrupt, more than three years prior to the filing of his voluntary petition, has conveyed certain property without intent to defraud, to a separate and distinct legal entity, the trustee of the bankrupt's estate has no right to recover such property as assets of the bankrupt.

POINT C.

The earnings of the real estate conveyed by a bankrupt more than three years prior to his adjudication cannot be recovered by a trustee in bankruptcy as assets of the bankrupt, since such earnings were the property of the separate legal entity.

ARGUMENT.

POINT A.

It is the petitioners' contention that the Porter Circuit Court had no jurisdiction of the subject matter of the action. Whether or not a court has such jurisdiction is determined by the allegations of the complaint. *Flanders v. Coleman*, 250 U. S. 223; *City of Long Beach v. Metcalf*, 103 Fed. 2nd 483. In the instant case the complaint alleges that:

"All of the monies and property of any kind and description was and remained the property of the said Bartol Sikich until the appointment of this plaintiff as trustee of the bankrupt estate of said Bartol Sikich. That since the 17th day of October, 1935, the plaintiff herein became and is now the owner of and entitled to all of the money, notes, bonds, real estate and other property, etc."

Under the allegations of the complaint, there is no adverse claimant so as to give a state court jurisdiction.

In *Taubel-Scott-Kitzmiller Co., Inc. v. Fox*, 264 U. S. 426, this court said:

"The possession which thus establishes its jurisdiction need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of his petition in bankruptcy but was not delivered to the trustee; where the property was delivered to the trustee, but was thereafter withdrawn from his custody; where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person who makes no claim to it; and where the property is held by one who makes claim but the claim is colorably only."

In this case the complaint alleges:

"That in truth and in fact the said Transfer Realty Company, Inc., was simply a name adopted by the

said Bartol Sikich and used by him in the transaction of his business and was and is a fictitious and dummy corporation organized by him for that purpose and for no other purpose (21-22). * * * That the defendants, Sikich and Sikich never intended to and in fact did not part with the ownership and title and the management of the property which they transferred to the said Transfer Realty Company, Inc. That they and each of them at all times treated the said property as the property of the said Bartol Sikich, and the Transfer Realty Company, Inc., and that the defendant, Emma Sikich, acquiesced therein. That the said Transfer Realty Company, Inc. was in fact the individual Bartol Sikich and simply a name which he adopted and used in the transaction of his individual business, and that the said Transfer Realty Company, Inc. was organized and incorporated for no other purpose." (35)

From these allegations it clearly appears that the trustee was attempting to recover the assets of Bartol Sikich and that there was no adverse claimant.

In *Robertson v. Howard*, 229 U. S. 254, quoting from *U. S. Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, this court said:

"We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all proceedings in bankruptcy is intended to be exclusive of all other courts and that such proceedings include among others all matters of administration, such as allowance, rejection and reconsideration of claims. The reduction of estates to money and its distribution, the determination of preference and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustee and others who are employed to assist them."

Petitioners take the position that under the allegations of the complaint and under the findings of fact wherein the court found petitioners Bartol Sikich and Emma Sikich

individually liable and ignored the existence of the Transfer Realty Company, Inc., it must be apparent that there were no adverse claimants, and that the jurisdiction of the bankruptcy court was exclusive of all other courts.

POINT B.

It appears from the special findings of fact that petitioner, Bartol Sikich, was adjudicated a bankrupt on June 1, 1935. On February 1, 1932 the petitioners, Bartol Sikich and Emma Sikich, and one Richard Houren, caused to be incorporated the Transfer Realty Company, Inc. That all of the proceedings in connection with the formation of a corporation were regularly complied with is not in dispute, and the court by its finding of fact No. 70, and several other findings conceded that the corporation existed and was doing business. The bankrupt conveyed his real estate to the corporation on February 8, 1932, more than three (3) years prior to his adjudication in bankruptcy. Under U. S. C. A. Title 11, Sec. 107e, the trustee in bankruptcy takes possession of all property of the bankrupt conveyed by the bankrupt within four months of the bankruptcy. If the conveyance was made more than four months preceding the bankruptcy, then the trustee is entitled to recover the property conveyed as assets of the bankrupt only where the conveyance was made

“with the intent and purpose on his (the bankrupt’s) part to hinder, delay or defraud his creditors or any of them.” (U. S. C. A., Sec. 107e) or “was transferred by him in fraud of his creditors” U. S. C. A., Sec. 110 (a-4).

In this case the court made special findings of fact. The Indiana Supreme Court as late as 1940 in the case of *Schwegman v. Neff*, 218 Ind. 63, 29 N. E. (2nd) 985, held that:

“Where fraud is essential to the existence of a cause of action, it must be found and stated in the special finding as a substantive fact or the plaintiff will suffer defeat.”

In the instant case there was no finding of fraud; consequently, in the absence of a special finding, the effect was that the court found that fraud did not exist. There being no fraud in connection with the conveyance by Bartol Sikich to the corporate petitioner, such conveyance must be permitted to stand. To the same effect see *Phelps v. Smith*, 116 Ind. 387.

This court has also held that fraud must be established as a positive fact: *Thompson v. Fairbanks*, 196 U. S. 516; *Coder, Trustee v. Arts*, 213 U. S. 223. The judgment which therefore permits the trustee to recover these assets from the petitioner corporation is in direct conflict with the bankruptcy act and with the holdings both of the Supreme Court of Indiana and of this court.

POINT C.

In addition to the recovery of the real estate, the court rendered a judgment ^{against} Bartol Sikich and Emma Sikich in the sum of \$17,411.80, based upon the earnings of the real estate conveyed by the bankrupt to the petitioner, Transfer Realty Company, Inc. Petitioners say that if the Transfer Realty Company, Inc. was a distinct legal entity, as the Supreme Court of Indiana held, then the judgment should have been against all three petitioners because the judgment was for the earnings of the real estate theretofore conveyed to the distinct legal entity: the court below held that:

“Actual possession as well as *indicia* of the right to possession was in another legal entity (390).”

If the actual possession as well as the *indicia* of the right to possession was in another legal entity, that is, the Transfer Realty Company, Inc., there should have been a personal judgment also against the other legal entity.

The findings by the trial court and the judgment against Bartol Sikich and Emma Sikich, and the failure to return

a judgment against the separate legal entity, indicates that the trial court either concluded that there was no separate legal entity or that the transfers to the separate legal entity were void even in the absence of fraud. However, the statute, U. S. C. A. Title 11, Sec. 107, 110 holds that such conveyance should be void only when they are made with intent to defraud. As the actual possession of the properties was in the Transfer Realty Company, Inc., then it was entitled to the earnings of the real estate and petitioners, Bartol Sikich and Emma Sikich, could not be liable. On the other hand, if the Transfer Realty Company, Inc. was an *alter ego*, then the Indiana State Court had no jurisdiction.

It is, therefore, submitted that this cause is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Indiana Supreme Court.

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